

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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Teresa Gethers,)	CASE NO.: 2:10-2763-RMG-BHH
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
iQor, Inc. and iQor US Inc.,)	
)	
Defendants.)	

This matter comes before the Court on the defendants' motion to dismiss plaintiff's claims pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et. seq.* ("USERRA") and S.C. Code § 8-7-90. This matter was referred to the United State Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(g) D.S.C., which provides for such referrals for all pretrial matters in employment discrimination cases. A Report and Recommendation was issued by Magistrate Judge Hendricks on March 2, 2011, recommending that the defendants' motion to dismiss be granted, in part, and denied, in part. Plaintiff has objected to the R&R. As shown herein, this Court has conducted a *de novo* review of the Record and agrees with the Magistrate Judge's report and adopts it as the Order of this Court, with modification as set forth below.

LAW/ANALYSIS

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and responsibility for making a final determination remains with this Court. *Mathews v. Weber*, 423 U.S. 261, 270-71, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). This Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made, and this Court may "accept, reject, or

modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). This Court may also “receive further evidence or recommit the matter to the magistrate with instructions.” *Id.*

Plaintiff filed a complaint alleging that the defendants breached the parties’ employment contract and violated USERRA. USERRA protects members of “the uniformed services” (38 U.S.C. § 4301(a)(3)) and the regulations expressly state that National Guard service under authority of State law is not provided such protection. 20 C.F.R. § 1002.57(b). Plaintiff failed to sufficiently plead a claim under USERRA because the complaint does not indicate that her service during September 15, 2008 and October 20, 2008 was performed pursuant to federal, rather than state, authority. In her objection to the Magistrate Judge’s Report and Recommendation, Plaintiff admitted that her National Guard service was not pursuant to Federal authority but requested the right to amend her complaint. (Dkt. No. 14 at 2) Recognizing this matter is at the motion to dismiss stage, the Court will give Plaintiff an opportunity to amend her complaint so long as any proposed amendment is filed within fifteen days of this Order. Defendants’ motion to dismiss the federal cause of action is denied at this point without prejudice.

The plaintiff also brings a claim pursuant to S.C. Code § 8-7-90, the state military leave law, but this statute is inapplicable in this matter concerning a private employer because the statute specifically protects only “officers and employees of this State or a political subdivision of this State.” S.C. Code Ann. § 8-7-90. Defendants’ motion to dismiss this claim is therefore granted.

CONCLUSION

After a *de novo* review of the record, Magistrate Judge's Report and Recommendation, and the relevant case law, this Court finds that the magistrate judge applied sound legal principles to the facts of this case. Accordingly, this Court adopts the Magistrate Judge's Report and Recommendation, as modified herein. Defendants' motion to dismiss the state cause of action is **GRANTED**, and the motion to dismiss the federal cause of action is **DENIED** without prejudice. Plaintiff shall have fifteen days from the date of this Order to file an amended complaint.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'R. Gergel', is written over a horizontal line.

Richard Mark Gergel
United States District Court Judge

March 24, 2011
Charleston, South Carolina